

No. 89-1577

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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JAMES L. HOOPER,  
*Petitioner,*

v.

JOHN GILL, JR., *et al.*,  
*Respondents.*

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On Petition for a Writ of Certiorari to the  
Court of Appeals of Maryland

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**BRIEF FOR RESPONDENTS IN OPPOSITION**

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## QUESTIONS PRESENTED

- I. Whether the Maryland Court of Special Appeals' refusal to remand the Petitioner's case for a new trial solely on the issue of nominal damages warrants review by the Supreme Court on Writ of Certiorari?
- II. Whether the Maryland trial and appellate courts' application of Maryland law on legal malpractice/breach of fiduciary duty to this case warrants review by the Supreme Court on Writ of Certiorari?
- III. Whether the Maryland courts' granting of summary judgment in favor of Respondents on Petitioner's claim of violation of 42 U.S.C. § 1983 warrants review by the Supreme Court?

**PARTIES TO THE PROCEEDING**

A list of the parties to the proceeding has been omitted pursuant to Rule 34.2 of the Supreme Court Rules.

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**OPINIONS BELOW**

Citations to the opinions delivered in the Courts below have been omitted pursuant to Rule 34.2 of the Supreme Court Rules.

**JURISDICTIONAL STATEMENT**

This Court lacks jurisdiction over Questions 1 and 2 set forth in Petitioner's Petition for Writ of Certiorari. Specifically, Question No. 1 concerns the Maryland Court of Special Appeals' refusal to remand Petitioner's legal malpractice case to the trial court for a second trial on

nominal damages. That issues does not involve any federal question and is based purely on Maryland law. As a result, this is not a proper subject for review by the Supreme Court on Writ of Certiorari under 28 U.S.C. § 1257. See, *Wetzel v. Ohio*, 371 U.S. 62, 83 S. Ct. 111 (1962).

Question No. 2 in the Petition also involves purely Maryland law and is not the proper subject for review by the Supreme Court. That Question concerns the alleged failure by the Maryland courts to apply their own decisions concerning legal malpractice/breach of fiduciary duty to the Plaintiff's case. Moreover, the Petitioner never raised the purported "constitutional" violations set forth in Petitioner's Question No. 2 in his Petition for Writ of Certiorari to Maryland's highest court, the Maryland Court of Appeals. As a result, the Supreme Court does not have jurisdiction to review this issue under 28 U.S.C. § 1257. *Webb v. Webb*, 451 U.S. 493, 494-496, 101 S. Ct. 1889 (1981).

The Supreme Court has jurisdiction over the Petitioner's 42 U.S.C. § 1983 claim pursuant to 28 U.S.C. § 1257 and 28 U.S.C. § 2101.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The only constitutional or statutory provision which is actually involved in this proceeding is 42 U.S.C. § 1983. The text of that statute is set forth in Petitioner's Petition and has been omitted here pursuant to Rule 34.2 of the Supreme Court Rules.

## STATEMENT OF THE CASE

In the proceedings below, the Circuit Court for Montgomery County, Maryland (Peter J. Messitte, Judge) entered final judgment in favor of the Respondents, John G. Gill, Jr., Esquire, Thomas J. Sippel, Esquire, and the law firm of Gill and Sippel, at the end of the Petitioner's



case in a trial of a claim alleging legal malpractice. The Court of Special Appeals of Maryland affirmed that judgment on appeal. The Court of Appeals of Maryland denied the Petitioner's Petition for Writ of Certiorari. The Court of Appeals of Maryland further denied the Petitioner's Motion for Reconsideration.

The Petitioner, Dr. James L. Hooper, filed his original Complaint in the Circuit Court on or about August 5, 1986. After numerous amendments adding new Counts and new parties, Dr. Hooper filed his Third Amended Complaint on December 1, 1986. The Third Amended Complaint alleged breach of fiduciary duty (Count I), tortious breach of fiduciary duty (Count II), and a civil rights violation under 42 U.S.C. § 1983 (Count III) for John Gill's disclosure of possibly perjured testimony of a witness to the prosecutor in a criminal Medicaid fraud case in which Gill represented Dr. Hooper. The Third Amended Complaint also alleged fraud (Count IV) against the Respondents in obtaining Dr. Hooper's signature on a release in connection with the settlement of a fee suit the law firm of Gill and Sippel had prosecuted against Dr. Hooper. Count IV asked that the release be set aside and the \$4,400.00 settlement payment returned.

At a hearing on August 26, 1987, Judge Messitte granted in part and denied in part the Respondents' Motion for Summary Judgment as to Count I (breach of contractual fiduciary duty) and Count II (tortious breach of fiduciary duty). Specifically, the Motion was denied as to liability on Counts I and II, but the Court ruled that in the event Dr. Hooper were able to establish liability on either Count I or II, he had suffered no compensatory damages and, therefore, his damages would be limited to \$1.00 in nominal damages for a technical violation of his rights. The Court dismissed with prejudice Dr. Hooper's claims for punitive damages in Counts I and II. The Court granted Respondents' Motion for Summary Judgments as to Count III (civil rights viola-

tion) because discovery had disclosed no evidence of any state action necessary to support the § 1983 claim.

On or about December 30, 1987, Dr. Hooper filed yet another amendment to the Third Amended Complaint (his fourth), adding Count V, entitled "Equitable Relief from Judgment." This Count requested that the Court vacate and reopen the Circuit Court's 1982 judgment in the fee suit (*Gill and Sippel v. Hooper*) on the grounds of Gill's alleged breach of fiduciary duty and requested a return of the attorney's fees awarded to the law firm of Gill and Sippel in that fee suit. At that same time, the Petitioner filed a separate "Petition for Writ of Error Coram Nobis/Motion to Reopen Judgment" in the fee suit of *Gill and Sippel v. Hooper*, Law No. 58524, on the same grounds as alleged in Count V. The Circuit Court granted the Respondents' Motion to Strike Count V because it requested the same relief as Counts I and II. In that same hearing, Judge Messitte denied the Petition for Writ of Error Coram Nobis in Law No. 58524, noting that it was identical to Count V and that it also requested the same relief as was already requested in Counts I and II of the Petitioner's Third Amended Complaint. Dr. Hooper subsequently appealed the Court's denial of the Petition for Writ of Error Coram Nobis to the Court of Special Appeals of Maryland, and the Court of Special Appeals affirmed that ruling on December 8, 1988.

The Respondents next filed and the Circuit Court granted a Motion for Partial Summary Judgment on Count IV (fraud) on the grounds that Gill's alleged breach of fiduciary duty would not have been a defense available to Dr. Hooper in the fee suit. Respondents subsequently filed a Motion for Summary Judgment on Count IV on the grounds that Dr. Hooper would not have prevailed on an appeal of the fee suit to the Court of Special Appeals even if he had not signed the allegedly fraudulent release and had prosecuted the fee suit through the appeal. The Circuit Court granted Re-

spondents' Motion for Summary Judgment on Count IV in a hearing on August 8, 1988.

As a result of the pre-trial rulings, this legal malpractice case went to trial on September 1, 1988 solely on Count I (breach of contractual fiduciary duty) and Count II (tortious breach of fiduciary duty). The only expert witness identified in discovery and called by the Petitioner at trial was Professor Abraham Dash of the University of Maryland Law School. In his deposition and at trial, Professor Dash testified that he was only qualified as an expert on the Code of Professional Responsibility and could not testify as an expert on the issue of whether Respondents' actions in this case constituted a breach of the civil standard of care for an attorney. After hearing Professor Dash's proffered testimony at trial, Judge Messitte granted Respondents' Motion in Limine to exclude Professor Dash's testimony.

At the conclusion of the Petitioner's/Plaintiff's case at trial, Respondents moved for judgment pursuant to Maryland Rule 2-519 on the grounds that the Petitioner/Plaintiff had failed to prove a breach of the standard of care by the Respondents/Defendants through expert testimony, as required by Maryland law. After oral argument on the Motion and review of all of the cases cited, Judge Messitte granted the Respondents' Motion for Judgment.

The Petitioner subsequently appealed the various pre-trial and trial rulings of the Circuit Court for Montgomery County to the Court of Special Appeals. In a published opinion, *Hooper v. Gill*, 79 Md. App. 437 (1989) issued on June 1, 1989, the Court of Appeals affirmed the judgment of the Circuit Court. The Court of Special Appeals recognized that the Petitioner's "allegations involving tortious and contractual breach of fiduciary duty focus on alleged legal malpractice." (A. 4). The Court further recognized that "[e]xpert testimony is necessary in a legal malpractice case to establish the existence of a

breach of a reasonable legal duty, except in that class of cases 'where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence from the facts.'" (A. 5).

However, the Court of Special Appeals found it unnecessary to decide the issue of whether Professor Dash's excluded testimony regarding the alleged violation of the Code of Professional Responsibility was sufficient to establish a breach of the civil standard of care because it recognized that "Dr. Hooper failed to prove any damages." (A. 8). The Court recognized that damage is an essential element of a cause of action against an attorney for breach of duty, (A. 4-5), and that "[s]ince there were no damages, there can be no recovery." (A. 8). The Court rejected the Petitioner's claim that he was entitled to nominal damages as a result of the alleged breach, noting that such damages, even if actionable, were "absolutely *de minimis* in view of the costs in judicial time of retrial on the sole issue of nominal damages." (A. 9).

The Appellate Court further held that since no compensatory damages were suffered by Dr. Hooper, his claim for fraud (Count IV) was properly dismissed by the Circuit Court. (A. 10). The Appellate Court also affirmed the trial court's ruling that Dr. Hooper was not entitled to the return of any attorney's fees paid to Gill since the alleged fraud of Gill occurred after Hooper had discharged Gill, and Gill was entitled to compensation for the legal services performed prior to the alleged fraud. (A. 10). Finally, the Court of Special Appeals affirmed the dismissal of the Petitioner's claim against the Respondents under 42 U.S.C. § 1983, since Gill was a private attorney and there was no evidence that Gill acted "under color of state law." (A. 10-11).

Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland. That Petition was denied. Petitioner then filed a Motion for Reconsideration with the Court of Appeals which was also denied.

### SUMMARY OF ARGUMENT

Petitioner's Petition for Writ of Certiorari raises no special or important issues warranting review by the Supreme Court. Questions Nos. 1 and 2 set forth in the Petition involve purely questions of Maryland state law and do not involve any federal questions. Question No. 2 was also not raised in Petitioner's Petition for Writ of Certiorari to Maryland's highest court, the Maryland Court of Appeals, and is not properly before this Court. 28 U.S.C. § 1257.

Additionally, the Maryland Court of Special Appeals' refusal to remand the Plaintiff's legal malpractice case for a second trial solely on the issue of nominal damages was proper and did not violate due process.

The Maryland courts also properly applied Maryland law on the issue of legal malpractice breach of fiduciary duty in this case.

The Maryland courts' granting of summary judgment in favor of Respondents on Petitioner's claim for violation of 42 U.S.C. § 1983 does not warrant review by the Supreme Court as it does not conflict with any decision of any other federal or state court, and it does not concern a federal question which has not been settled by the Supreme Court. The Maryland courts' ruling that there was no concerted action between the Respondents, who are private attorneys, and a state official necessary to constitute action "under color of state law" for purposes of 42 U.S.C. § 1983 was also proper. Accordingly, this Court should deny the Petitioner's Writ of Certiorari.

## ARGUMENT

### **I. THE MARYLAND COURT OF SPECIAL APPEALS' REFUSAL TO REMAND THE PETITIONER'S CASE FOR A SECOND TRIAL ON NOMINAL DAMAGES DOES NOT INVOLVE ANY SPECIAL OR IMPORTANT ISSUES WARRANTING REVIEW BY THE SUPREME COURT.**

The first Question raised in the Petition for Writ of Certiorari claims that the Court of Special Appeals of Maryland denied the Petitioner constitutional due process when it refused to remand the case to the trial court for a second trial solely on the issue of nominal damages. The Petitioner contends that the Court of Special Appeals had no authority to exercise discretion and refuse to remand the case for a new trial. This contention raises no special or important issues warranting review by the Supreme Court.

First, the Petitioner's contention that he was denied due process by the Appellate Court's refusal to remand for a new trial on nominal damages is simply not true. The Petition admits that the Petitioner had full due process on that claim in the original trial. The Petition acknowledges that the Petitioner's claim for nominal damages did go to trial in the Circuit Court for Montgomery County, Maryland. After the Petitioner presented his entire case, including the claim for nominal damages, the trial court granted the Respondents' Motion for Judgment because the Petitioner had failed to prove his case through the required expert testimony. The Court of Special Appeals of Maryland affirmed that judgment on different grounds. Specifically, the Court of Special Appeals recognized that damage was a necessary element of proof on the Petitioner's claim for legal malpractice, and that the Petitioner had failed to prove any damages at trial. (A. 8-9). The Court of Appeals of Maryland affirmed that decision when it refused to grant the Petitioner's Petition for Writ of Certiorari.

Due process only requires notice and the opportunity to be heard at a meaningful time and in a meaningful

manner. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 108 S. Ct. 1740, 1747 (1987); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 1494 (1985). The Petitioner received full due process in litigating his claims against the Respondents in the trial in the Circuit Court for Montgomery County, Maryland. The Maryland Appellate Courts gave the Petitioner additional due process on those claims in reviewing his appeals and in affirming the trial court's decision. The Appellate Court's refusal to remand the case for a *second* trial solely on the issue of nominal damages did not deny the Claimant any right of due process. Due process does not require that an individual be afforded *two* trials on the same issue.

Second, this issue solely involves Maryland law and does not raise any federal questions warranting review by the Supreme Court. The issue of whether a party is entitled to compensatory and or nominal damages in a legal malpractice case in Maryland is strictly an issue of Maryland state law. The Court of Special Appeals was correct in recognizing that in Maryland *compensatory* damages are a necessary element of a cause of action for legal malpractice. (A. 4-5, 8-9). See, *Flaherty v. Weinberg*, 303 Md. 116, 128, 492 A. 2d 618 (1985). As a result, this issue is not a proper subject for review by the Supreme Court on Writ of Certiorari under 28 U.S.C. § 1257. See, *Wetzel v. Ohio*, 371 U.S. 62, 83 S. Ct. 111 (1962).<sup>1</sup>

Third, the Petitioner's contention that the Maryland Court of Special Appeals did not have the discretion to refuse to remand the case for a second trial on the issue

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<sup>1</sup> Petitioner's assertion that this legal malpractice claim involves an "intentional tort" entitling him to presumed damages is frivolous. Maryland recognizes only a limited number of intentional torts, such as *per se* defamation and trespass to land, for which damages may be presumed. Legal malpractice is not such a tort. See, *Flaherty v. Weinberg, supra*; *Glasgow v. Hall*, 24 Md. App. 525, 529-539 (1975).



of nominal damages is a mis-statement of Maryland law. In Maryland, the Appellate Courts will not reverse and remand an error by a trial court "unless that error is 'both manifestly wrong and substantially injurious'". *I.W. Berman Properties v. Porter Bros., Inc.*, 276 Md. 1, 11-12 (1975); *Rotwein v. Bogart*, 227 Md. 434, 437 (1962). Thus, under established Maryland law, the Court of Special Appeals properly refused to remand the case for a new trial solely on the issue of nominal damages.

The federal courts have a similar provision found in 28 U.S.C. § 2111, which provides:

*Harmless Error*

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Thus, the federal appellate courts also have the discretion to refuse to remand a case on appeal for a new trial if the only errors or defects do not affect the substantial rights of the parties. Clearly, the Petitioner's claim for nominal damages of \$1.00 is not a "substantial right" warranting remand for a second trial on the same matter.

Finally, the Petitioner's claim that the Court of Special Appeals should have remanded the case to the trial court for a new trial solely on the issue of nominal damages does not involve any of the "special and important reasons" for review by the Supreme Court which are set forth in Rule 17 of the Supreme Court Rules. It does not concern conflicting decisions of two federal appellate courts, it does not concern a state court decision which is in any way in conflict with decisions of other courts on a federal question and it does not concern an important question of federal law which has not been settled or decided by the Supreme Court. As a result, this issue does not warrant review by the Supreme Court.



**II. THE PETITIONER'S ARGUMENT THAT THE MARYLAND COURTS VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHEN THEY ALLEGEDLY "FAILED AND REFUSED TO APPLY THEIR OWN DECISIONS TO THIS PARTICULAR CASE" DOES NOT WARRANT REVIEW BY THE SUPREME COURT.**

The Petitioner's Question No. 2 contends that the Maryland courts "failed and refused to apply their own decisions to this particular case." The Petitioner contends that through this alleged failure to apply their decisions, the Maryland courts "have endorsed policies that are at odds with the Fifth, Sixth and Fourteenth Amendment guarantees, and have created unique procedural and evidentiary requirements for this particular case, thereby denying both due process and equal protection." Petition at Pages 10-11. This argument clearly involves no federal question warranting review by the Supreme Court.

Even if the Petitioner is correct in his argument that the Maryland courts somehow failed to follow or apply their own decisions concerning the Respondents' alleged breach of fiduciary duty/legal malpractice in this case, that issue is not the proper basis for a Petition for Writ of Certiorari to the Supreme Court. Maryland state court decisions concerning Maryland law on legal malpractice and breach of fiduciary duty do not concern any federal questions and are not the proper subject of review by the Supreme Court. 28 U.S.C. § 1257.

Moreover, a review of the decision by the Court of Special Appeals and the cases it cites (A. 2-11) demonstrates that the Court of Special Appeals *did* properly apply Maryland law on legal malpractice in ruling upon the Petitioner's issues raised on appeal. Petitioner's assertions as to Maryland law on legal malpractice are simply wrong, and every Maryland court which has considered the Petitioner's arguments has ruled against him based on established Maryland law.

Additionally, the Petitioner never raised this purported constitutional issue in the Court of Special Appeals nor in the Court of Appeals of Maryland. As a result, it is not properly raised for the first time in the Supreme Court. 28 U.S.C. § 1257; *Webb v. Webb*, 451 U.S. 493, 494-496, 101 S. Ct. 1889 (1981).

The Petitioner's claim that the Maryland courts improperly applied Maryland law to his claim for legal malpractice does not raise any special or important issues warranting review by the Supreme Court under Rule 17. This issue does not concern conflicting decisions by two Federal Court of Appeals, it does not concern a state court decision on a federal question which conflicts with the decision of another court and it does not involve an important question of federal law which has not been decided or settled by the Supreme Court. As a result, there is no basis for review by the Supreme Court on this issue.

### **III. THE MARYLAND COURTS' GRANTING OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON PETITIONER'S CLAIM OF VIOLATION OF 42 U.S.C. § 1983 DOES NOT WARRANT REVIEW BY THE SUPREME COURT.**

The Petitioner contends in Question No. 3 that the trial court erroneously granted Respondents' Motion for Summary Judgment on his claim under 42 U.S.C. § 1983, and that the Court of Special Appeals' ruling which affirmed that decision was also erroneous.

The Petitioner alleged in his Complaint that there was a violation of 42 U.S.C. § 1983 due to an alleged conspiracy between the state prosecutor and Respondent John Gill through which Respondent Gill would furnish information to the prosecutor relevant to the Petitioner's criminal case. The undisputed facts obtained in discovery and submitted in support of the Respondents' Motion for Summary Judgment demonstrated that no conspiracy existed.

The trial court granted the Respondents' Motion for Summary Judgment on the § 1983 claim because there were no facts establishing any concerted action between Respondent Gill, a private attorney, and any state official. Proof of such concerted action was necessary to meet the "color of state law" requirements of § 1983. The Court of Special Appeals of Maryland affirmed that decision since there were no facts demonstrating any concerted action "under color of state law." (A. 10-11).

This ruling does not concern any special or important issues warranting review by the Supreme Court. There are numerous decisions from the Supreme Court as well as other federal and state appellate courts setting forth the necessary elements to prove a civil cause of action under 42 U.S.C. § 1983. There are also numerous appellate decisions defining and analyzing concerted action between a private party and a government official necessary to bring the action of the private party "under color of state law" for purposes of 42 U.S.C. § 1983.

The rulings of the trial court and of the Court of Special Appeals of Maryland in which they found that there was no concerted action does not conflict with the decision of any other federal or state court. Rather, these decisions were in accordance with the rulings of other courts on the issue. *See, Benavidez v. Gurnell*, 722 F.2d 615, 618 (10th Cir. 1983); *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323, 327 (7th Cir. 1978); *Von Lusch v. C & P Telephone Co.*, 457 F. Supp. 814, 819 (D. Md. 1978). Moreover, this issue does not concern a question of federal law which has not been settled by the Supreme Court. The federal law concerning 42 U.S.C. § 1983 is well established. As a result, the Supreme Court should deny the Petitioner's Petition for Writ of Certiorari on this issue.

### CONCLUSION

The Petitioner has demonstrated that he is a litigious individual who is unhappy with the fact that he was criminally prosecuted for medicaid fraud. He first sued

Dale Kelberman, the Assistant Attorney General who prosecuted the case, Steven Sachs, the Attorney General of Maryland, and others for alleged violations of his civil rights in that criminal prosecution. *See, Hooper v. Sachs*, 618 F. Supp. 963 (D. Md. 1985). The Defendants in that case filed a Motion for Summary Judgment which was granted. Dr. Hooper appealed that decision, and the Fourth Circuit Court of Appeals affirmed the summary judgment in an unpublished opinion. *See, Hooper v. Sachs*, 823 F.2d 547 (4th Cir. 1987). Dr. Hooper then filed a Petition for Writ of Certiorari to the Supreme Court which was denied. *See, Hooper v. Sachs*, 484 U.S. 954, 108 S. Ct. 347 (1987).

Dr. Hooper then filed this case against his former attorneys. Judgment was entered in favor of the Respondents by the Circuit Court for Montgomery County, Maryland and was affirmed in two separate opinions by the Court of Special Appeals. Dr. Hooper subsequently filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland which was also denied.<sup>1</sup> He requested reconsideration, and that request was denied. There are no matters left which warrant review by the Supreme Court, and it is time for an end to this litigation.

For the reasons set forth above, Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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